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Supreme Court of the United States

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE CO., et al.,

Appellants,

against

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

BRIEF FOR APPELLEE

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Appellants,

against

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

BRIEF FOR APPELLEE

Statement

The appellants have appealed to this Court pursuant to U. S. Code, tit. 28, Sec. 344(a), from a final judgment of the Supreme Court of the State of New York, County of New York, dated July 24, 1947, and entered upon a remittitur from the Court of Appeals of the State of New York, in a declaratory judgment action attacking the constitutionality of the provisions of the Abandoned Property Law of the State of New York dealing with unclaimed life insurance funds, and seeking to restrain the State Comptroller from proceeding with the enforcement thereof.

Appellants (plaintiffs in the original action) are a group of life insurance companies chartered in states other than

New York but all licensed to and actually doing business in New York. They challenged the validity of the statute under the contract clause (Art. 1, Sec. 10), and the due process clause of the Fourteenth Amendment.

Upon motions made by both sides for a decision on the pleadings, Special Term of the State Supreme Court annulled the statute in so far as it pertains to policies of life insurance issued for delivery *outside* the State of New York, but upheld the challenged provisions in all other respects, except that the Court put aside an issue as to the alleged unlawful operation of the statute upon defenses which such companies might have to claims upon their insurance contracts (R. 36-55). The opinion rendered at Special Term is reported in 187 Misc. 1004, 65 N. Y. Supp. (2d) 143 [1946].

Upon appeal by the insurance companies to the Appellate Division of the Supreme Court, First Department, the judgment of Special Term was *unanimously* affirmed, without opinion (271 App. Div. 1002, 69 N. Y. Supp. (2d) 323 [1947]).

Upon further appeal by the insurance companies to the Court of Appeals, that court *unanimously* affirmed the ruling of the courts below as to the constitutionality of the statute, but modified the judgment below by striking out the reservation which had been made on the question as to whether the statute wrongfully does away with defenses which the companies might have to claims on their policies (R. 61-66). The opinion of the Court of Appeals is reported in 297 N. Y. 1, 74 N. E. (2d) 24 [1947].

The insurance companies have appealed to this Court as a matter of right. On October 20, 1947, this Court noted probable jurisdiction (R. 76).

Facts

The Statute.

The Abandoned Property Law of the State of New York (Consolidated Laws, chap. 1; McKinney's Consolidated Laws of New York, Book 2½)* sets up a mode of procedure whereby the State takes into its custody certain types of personal property as to which there has been a failure of title, or which has been actually abandoned or is presumed to be abandoned by lapse of time. The policy of the State, as set forth in Section 102 of the Law, is to take over and utilize such unclaimed property for the benefit of all of the people of the State, while at the same time protecting the interests of the owners thereof who may appear at a subsequent date.

The statute makes provision for the taking over by the State of unclaimed property held by banking organizations and utility and life insurance companies, as well as unclaimed funds on deposit in federal courts within the State, and unclaimed condemnation awards. The law sets up presumptions of failure of title or abandonment due to lapse of time and outlines the procedure under which such unclaimed funds are to be paid to the State. Put another way, the Legislature has by this act provided means for taking into the custody of the State certain funds actually or constructively in the territorial limits of the State and which are presumed by lapse of time to have been abandoned or to have suffered a failure of title, and to utilize the moneys for the benefit of all the people until claim is made by the true owner.

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* The pertinent provisions of the statute are printed in the Record as Exhibits "A" and "B" annexed to the Complaint (R. 21-35) and as "Appendix A" in appellants' brief. They were discussed and construed in both the opinions of Special Term and the Court of Appeals (R. 37-40; 61-62).

The specific portion of the statute here under attack is contained in Article VII thereof and pertains to unclaimed life insurance funds. The relevant sections of the particular Article and various general provisions contained in the statute and relating to life insurance funds, among others, may be summarized as follows.

The Act provides that certain unclaimed property held or owing by life insurance corporations shall be deemed to be abandoned property. Such property—as defined in Sec. 700 of the law—includes any moneys "held or owing" by any life insurance company which have remained unclaimed for seven years by the person or persons entitled thereto under (1) matured life insurance policies on the endowment plan issued on the lives of residents of New York, (2) other kinds of life insurance policies issued on the lives of residents of New York, where the insured, if living, would have attained the limiting age under the mortality table on which the reserves are based; or (3) life insurance policies issued on the lives of residents of New York who have actually died.

It is provided that on or before April first in each year, every life insurance corporation shall make a verified written report to the State Comptroller of all such abandoned property held or owing by it (Sec. 701). Within thirty days thereafter such corporation shall publish a newspaper notice to the persons appearing to be entitled to any of such unclaimed moneys together with a statement (1) that a list of the names of such persons is on file and open to public inspection at the principal office of the corporation; (2) that payment of such unclaimed moneys will be made on or before the succeeding August thirty-first to persons establishing their right thereto; and (3) that in the succeeding September such unclaimed moneys still remaining will be paid to the State Comptroller, after which the insurance companies shall cease

to be liable therefor (Sec. 702). Such payments shall be made to the State Comptroller at the time so fixed (Sec. 703). Thereupon the care and custody of such property shall pass to the State, the State shall be responsible for all claims established thereto pursuant to law less any lawful deductions, and the insurance companies shall be relieved of liabilify for any such claim (Sec. 1404). The State Comptroller shall publish annual statements of abandoned property received by him and not paid to claimants (Sec. 1402). Claims may be filed with him for such property and his determination thereof shall be subject to review in the courts (Sec. 1406). The statute shall be enforced notwithstanding the bar of any statute of limitations (Sec, 1400).

Subdivision (d) of Sec. 103 of the Abandoned Property Law defines a "life insurance corporation" within the meaning of and subject to the law as being "any insurer corporation organized under the laws of this state or any foreign corporation authorized to do either one or both kinds of insurance business authorized in paragraphs one and two of Section forty-six of the insurance law, as amended from time to time".

The State does not escheat these funds unto itself, but merely takes them into its custody; the Act makes full provision for the filing of claims and payment by the Comptroller as well as judicial review of his denial of any claim (Secs. 1406, 1407).

We might here note that appellants do not object to the method or procedure set up by the statute for the collection of the funds. Their complaint of unconstitutionality goes to the very right of the State to take into its custody those funds set forth in Section 700 as being deemed abandoned property.

Proceedings Below.

This action was instituted by a group of foreign* life insurance companies, all licensed to and doing business in New York in conformity with its Insurance Law, for a judgment declaring Article VII of the Abandoned Property Law to be unconstitutional as applied to such foreign life insurance companies and enjoining the State Comptroller from proceeding with the enforcement thereof.

No attack is made upon the statute by domestic companies.

After answer had been made to the complaint (R. 35-36), both sides moved for judgment on the pleadings.

At the hearing before Special Term, and in his brief to that court, the Comptroller conceded that although literally the law applied to all life insurance companies authorized to do business in New York, yet it must be construed as being intended to apply only to companies actually doing business in the State and to such policies as were written through domestic companies or duly licensed domestic (*i. e.*, New York) agencies of foreign companies, with the additional requirement that the assured be at the time of the writing of the policy a resident of New York (R. 47).

The Comptroller conceded that the statute did not apply to foreign companies which did not do business in New York, although authorized so to do, nor to policies written by a foreign branch of a foreign company, even though the assured was a resident of New York. In other words, in so far as foreign companies are concerned, the Comptroller conceded (and it has been so decided below), that the *statute applies only to the business done by them in New York, with residents of New York* (cf. *Mutual Life Insurance Co.* v. *Cohen*, 179 U. S. 262 [1900]).

* We apply the descriptive term "foreign" to the appellant companies in the sense that they were all incorporated in a state other than New York.

Special Term, in an exhaustive opinion (R. 36-55), found, as conceded by the Comptroller, that the statute was invalid in so far as it literally purported to apply to policies written outside of the State by foreign companies, but that it was wholly valid in its application to policies written through domestic agencies of foreign companies on the lives of New York residents. In effect, the court held that the proceeds of unclaimed or abandoned policies which "were written and/or delivered in New York by New York agencies of [foreign] companies and insured the lives of New York residents" (R. 51) were subject to being taken into custody by New York rather than by the state where the company was originally incorporated.

Special Term accordingly denied the Comptroller's motion for judgment on the pleadings in so far as the statute was claimed to be invalid as to policies written outside the State by foreign branches of foreign insurance companies, but granted the motion in all other respects.

As to the claim of the companies that they *may* possess various kinds of defenses to claims upon some of the policies and that the Act deprived them of such defenses, Special Term pointed out that the complaint did not state facts showing the existence of any defense to any specific policy, that "the fact that the companies may possess valid defenses to some of the policies does not render the statute unconstitutional, in so far as other policies are concerned to which there are no valid defenses," and that the proper remedy of the companies as to any policy to which they claim a whole or partial defense was to refuse to turn over the amount due on such policy and to bring such declaratory judgment actions as they might deem proper with respect thereto (R. 52-53). The judgment entered at Special Term accordingly recited that the decree was without prejudice to the right of the companies to assert that the law was unconstitutional in so far as it purported to deprive them of any total or partial defense to any specific policy (R. 3).

In order that there should be no question about the exact type of policy as to which Special Term held the law unconstitutional, counsel for both sides agreed on the language to be used in the judgment (without any concession by the companies as to the correctness of the decision by Special Term), which, as entered, adjudicates that the provisions of the Abandoned Property Law pertaining to life insurance companies are "unconstitutional and void in so far as they apply to policies of life insurance issued for delivery outside of the State of New York by foreign life insurance companies" (R. 2-3), and that except as so set forth, said provisions, in so far as under attack in this action, "are in all respects constitutional and valid" (R. 3).

Upon appeal by the insurance companies, the judgment rendered at Special Term was *unanimously* affirmed, without opinion, by the Appellate Division of the Supreme Court, First Department.

Upon further appeal by the insurance companies to the Court of Appeals, that court, in a *unanimous* opinion (R. 61-66), modified the judgment below by striking out the reservation made by Special Term as to the right of the companies to later assert that the law was unconstitutional in so far as it allegedly purported to deprive the companies of defenses which they might have to some policies, treated the question on its merits, and held that the statute leaves the companies wholly free to set up any defenses that they might have and to show that no moneys (or only some portion of the face amount) were "held or owing" (Sec. 700) on any particular policy. In all other respects the judgment of Special Term, as affirmed by the Appellate Division, was unanimously upheld.

The Question Presented

Basically, the only question which this appeal brings up for determination is whether the State of New York has the power to take into its custody as abandoned property moneys due on policies written on the lives of New York residents by domestic (New York) agencies of foreign life insurance companies and issued for delivery in New York. We respectfully submit that the *affirmative* answer unanimously given to this question by all the courts below should be affirmed by this Court.

POINT I

The constitutionality of custodial statutes such as the one in question is well established.

It is by now well settled that a state may compel surrender to it and take into its custody tangible or intangible personal property, actually or constructively in the territorial limits of the state, where there is substantial ground for belief that the fund has been abandoned, forgotten or otherwise left without private ownership.

Anderson National Bank v. *Luckett*, 321 U. S. 233 [1944] [Bank Deposits];

Security Bank v. *California*, 263 U. S. 282 [1923] [Bank Deposits];

Provident Institution for Savings v. *Malone*, 221 U. S. 660 [1911] [Bank Deposits];

Brooklyn Borough Gas Co. v. *Bennett*, 154 Misc. 106, 277 N. Y. Supp. 203 [1935] [Utility Deposits];

In re: Philadelphia Electric Company, 352 Pa. 457, 43 A. 2d 116 [1945] [Unclaimed corporate dividends].

The sovereign's right applies even to funds on deposit in the registry of a federal court situated within the state's boundaries.

United States v. *Klein*, 303 U. S. 276 [1938].

It is sufficient that the fund be constructively in the State's territorial limits.

United States v. *Klein*, 106 Fed. 2d 213 [1939]; certiorari denied, 308 U. S. 618.

Appellants present two main arguments in an effort to avoid the foregoing well-settled principles concerning the State's right to take abandoned personal property into its custody. Firstly, they contend that moneys due from them on policies and remaining unclaimed belong to the companies themselves, and are not debts or choses in action similar to bank or utility deposits; and, secondly, that although they do business in New York through domestic agencies under license from the Superintendent of Insurance and in conformity with the New York Insurance Law, yet because they were originally incorporated in a foreign state, these unclaimed funds, even if debts or choses in action, do not have their situs in New York and are not a proper subject for appropriation into the custody of the State.

We shall show in Points II and III hereinafter that these contentions are wholly untenable. In view of the exhaustive nature of the opinions of Special Term and the Court of Appeals with respect to both these arguments, we shall refrain as far as possible from being repetitious.

POINT II

The unclaimed funds covered by Section 700 of the Abandoned Property Law are not the property of the insurance companies, but are rather unclaimed liquidated debts due and owing from the companies to those insured or their beneficiaries.

As to the Nature of the Debt.

Generally speaking, the funds deemed by Sec. 700 to be abandoned property arise either out of endowment policies which have matured or other types of life insurance policies where the insured has actually been shown to have died or is presumed to have died, and no claim has been made to the proceeds for at least seven years. The policies are all in the category of those in which the insured has met all the obligations of the contract by him to be performed. The only thing which keeps the money in the hands of the insurance companies is that no claim has been made by the person entitled to receive the same.

A life insurance policy is a contract to pay a stated sum of money upon the death of the insured in consideration of certain payments duly made by him, or on his behalf, at fixed periods during his life (*Reed* v. *The Provident, etc., Society,* 190 N. Y. 111, 118; 82 N. E. 734 [1907]). It is a contract susceptible of ownership like any other chose in action. It is not insurance for a single year with a privilege of renewal from year to year by paying the annual premium, but rather an entire contract of insurance for life, subject to forfeiture for non-payment of premiums (*Burnet* v. *Wells,* 289 U. S. 670, 679 [1933]).

Life insurance "* * * is simply a contract, so far as the company is concerned, to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen * * *" (*Central Bank of Washington* v. *Hume,*

128 U. S. 195, 205 [1888]). Immediately upon the happening of the event upon which the policy is conditioned—the maturity of an endowment policy or the death of the assured in a life policy—the insurance companies are unquestionably in the position of debtors for the stated amount to those so entitled to receive the proceeds of the policy.

Upon the death of the assured covered by a life insurance policy, the policy as such ceases to exist and there remains simply a liquidated debt for the amount of the policy. * * * The obligation to pay in accordance with the terms of the contract is in force, but the policy of life insurance is no longer in force. It has been transformed into a liquidated debt by the happening of the contingent event theretofore provided for." (*McDonnell* v. *The Mutual Life Insurance Company of N. Y.*, 131 App. Div. 643, 646; 116 N. Y. Supp. 35, 37 [1909]).

A fortiori, when an endowment policy matures, it becomes evidence of a debt due and owing the insured or those entitled to claim under him. It is no longer in existence as a policy, but simply as a liquidated debt due from the company to the insured (*Anderberg* v. *Metropolitan Life Insurance Co.*, 269 App. Div. 640; 58 N. Y. Supp. (2d) 120 [1945]).

In *New York Life Ins. Co.* v. *Federal National Bank*, 151 F. (2d) 537 [1945], cert. den. 327 U. S. 778, reh. den. 327 U. S. 816, the Court said, at page 539:

> "The relationship between a policy-holder and his company is in many respects analogous to that between a depositor and the bank. When a policy of insurance is issued, the company becomes indebted to the insured for the amount of the policy. In the contract the company agrees to pay the amount of the policy to the insured or to his order. A life insurance

contract differs from a contract resulting from a deposit in a bank in that the policy designates the persons to whom payment is directed. But it also gives the insured the right to give further or different orders for the payment of the amount due by giving the insured the right to change the beneficiary, and the further right to assign the policy."

See also:

Pape v. *Home Insurance Co.*, 139 F. (2d) 231, 234, [1943];

Van Saun v. *Metropolitan Life Insurance Co.*, 135 Misc. 855, 857; 239 N. Y. Supp. 698, 700 [1929].

We submit that there can be no doubt that the money due on a policy wherein the contingency provided for has occurred, represents a liquidated debt, to the extent of the face amount of the policy, due and owing from the insurance company to those entitled to the proceeds of the policy and that such money is "held or owing" within the meaning of Sec. 700 of the Abandoned Property Law; moneys due on such policies are debts analogous to the bank deposits involved in *Anderson National Bank* v. *Luckett*, 321 U. S. 233, *supra*, and the other cases cited in Point I, *supra*.

The fact that these companies do not have any specific sum set aside for each policy does not change the nature of the obligation; in this respect, banking organizations likewise intermingle the depositors' moneys, yet their debts have been held subject to being taken over by the State as abandoned property (see cases cited under Point I). So too, as to unclaimed corporate dividends, see: *In Re: Philadelphia Electric Company*, 352 Pa. 457, *supra*.

As to Claimed Defenses to Policies.

Appellants argue that the moneys due on some of the policies are not liquidated debts because they may have a good defense by virtue of fraud or misrepresentation or breach of conditions as to suicide, etc. The complaint does not set up any specific cases of policies as to which the companies claim such defenses; even if it did, it must be remembered that the question as to whether specific types of policies fall within the meaning or definition of a statute is of no relevancy in a declaratory judgment action seeking to declare the statute as a whole unconstitutional.

> "In passing upon the constitutionality of a statute," the judiciary is "concerned only with its practical general operation, not with the precise effect of descriptive words which may be applied to a given case." (*Peo. ex rel. Ryan* v. *Lynch*, 262 N. Y. 1, 3; 186 N. E. 28, 29 [1933].)
>
> cf. *Guardian Life Insurance Company of America* v. *Graves*, 268 App. Div. 809 [Case No. 4], 48 N. Y. Supp. (2d) 618 [1944]; aff'd, 294 N. Y. 953, 63 N. E. (2d) 185;
>
> *Caroline Products Co.* v. *United States*, 323 U. S. 18, 22 [1944].

Section 700 of the law defines abandoned property as money "held or owing" on a policy. If the companies have a good total or partial defense to any policy, the statute in no way precludes them from showing that no money is "held or owing" on such policy. We submit that there can be no gainsaying the statement by the Court of Appeals (R. 66) that:

> "* * * the statute (Sec. 700) leaves any of the plaintiff companies wholly free to set up any complete or partial defense whereby it may establish that

no moneys are 'held or owing' by it on a particular policy, or that only some fraction of the face amount of the contract is payable thereon. Maybe, as the companies say, they cannot effectually prepare possible defenses without a proof of claim, but inconvenience of that kind does not nullify the statute. • • •"

Aside from any questions of incontestability after two years (N. Y. Insurance Law, Sec. 155 [b]), it is to be remembered that the burden of establishing a breach of warranty or the falsity of a material representation rests upon the insurance company.

Piedmont & Arlington Life-Insurance Co. v. *Ewing*, 92 U. S. 377 [1875];
Northwestern Mutual Life Insurance Co. v. *West*, 68 F. (2d) 428 [1933], cert. den. 292 U. S. 627;
Keck v. *Metropolitan Life Insurance Company*, 238 App. Div. 538, 539; 264 N. Y. Supp. 892, 893 [1933]; aff'd, 264 N. Y. 422; 191 N. E. 495;
Van Valkenburg v. *American etc., Life Insurance Company*, 70 N. Y. 605 [1877].

The presumption is that the true age is stated in the policy.

Goell v. *United States Life Insurance Company*, 265 App. Div. 735, 736; 40 N. Y. Supp. (2d) 779, 780 [1943].

The law places not upon the insured but upon the insurer the onus of establishing any fraud or misrepresentation or a lapse of the policy.

Hirsch v. *New York Life Insurance Company*, 267 App. Div. 404, 408; 45 N. Y. Supp. (2d) 892, 895-6 [1944], and cases therein cited.

The burden of proving death by suicide is upon the insurance company. The presumption is against death by suicide. It is not the duty of the claimant under the policy to prove that the deceased did not commit suicide.

Home Benefit Association v. *Sargent*, 142 U. S. 691 [1892];

Modern Woodmen of America v. *Watkins*, 132 F. (2d) 352 [1942];

Williams v. *The United States Mutual Accident Association*, 82 Hun 268, 31 N. Y. Supp. 343 [1894], aff'd 147 N. Y. 693, 42 N. E. 726;

Harms v. *Metropolitan Life Insurance Company*, 67 App. Div. 139, 141; 73 N. Y. Supp. 513, 514 [1901].

As to Proof of Death and Surrender of Policy.

The fact that the company may not receive its "proof of death" does not militate against its opportunity to establish these defenses, for it is well settled that the requirement of proof of death means only proof of the event and the identity of the deceased; the company may not require additional details as to the ailments for which the deceased was treated or other details not directly concerned with the proof of death and the identity of deceased.

McCaffry v. *Metropolitan Life Insurance Company*, 172 Misc. 252, 257-259; 14 N. Y. Supp. (2d) 192, 196-7 [1939]; aff'd, 261 App. Div. 452; 25 N. Y. Supp. (2d) 926; aff'd, 287 N. Y. 704; 39 N. E. (2d) 306;

Buffalo, etc., Safe Deposit Company v. *Knights, etc., Association*, 126 N. Y. 450, 453-4; 27 N. E. 942 [1891].

The furnishing of proof of death is not a condition to the fixing of liability but rather a condition which must be fulfilled to enforce payment of the already accrued obligation in the sense that it is to be shown that the assured is dead. Upon the happening of the event upon which the policy is conditioned, "the reciprocal rights and liabilities of the parties have become fixed * * *." (*McNally et al.* v. *Phoenix Insurance Co.*, 137 N. Y. 389, 397-398; 33 N. E. 475, 477 [1893]). The requirement of due proof of death is simply "to give assurance that the event has happened, upon which the liability of the insurers depends." (*Wachtel* v. *Equitable Life Assurance Society*, 266 N. Y. 345, 351-352; 194 N. E. 850, 852 [1935]).

See also:

Commercial Casualty Insurance Co. v. *Stinson*, 111 F. (2d) 63 [1940], at p. 68, n. 11; cert. den. 311 U. S. 667;

Lampert v. *John Hancock Mutual Life Insurance Co.*, 28 Fed. Supp. 142 [1939], aff'd 107 F. (2d) 1016, cert. den. 309 U. S. 663.

We shall not attempt to paraphrase the language used by Special Term in rejecting appellants' arguments regarding proof of death and the surrender of policies (R. 52):

> "It is urged that until due proofs have been filed with the companies of the occurence of the contingencies which make the policies payable (such as death of the insured or expiration of the term of an endowment policy) the persons entitled to the benefits of the policies possess at most 'inchoate or potential choses in action'. Paragraph (a) of subdivision 1 of section 700 requires the turnover of unclaimed amounts of *matured* endowment policies and paragraph (c) makes like provision as to policies on the lives of residents *who have died*. Clearly, as to such

policies, the failure to file formal proofs with the companies is no different in principle than the failure to produce savings bank books, the production of which savings banks uniformly make a condition precedent of payment. Yet the United States Supreme Court has upheld the validity of statutes, similar to our Abandoned Property Law, which have been directed at savings banks (Provident Institution for Savings v. Malone, *supra;* Security Bank v. California, *supra*), notwithstanding the absence of any statutory requirement that the bank books be produced. The only other policies covered by the statute are those specified in paragraph (b), viz., where the insured, if living, would have reached the maximum age 'of the Mortality Table' (this varies from about 96 to 100, according to the Table used). It would seem that as to the amounts of such policies there is ample basis for holding that the choses in action are no longer merely potential or inchoate, and for permitting a state to take over custody, not for itself, but for the benefit of the claimants if they should ever appear."

POINT III

Both as a matter of law and in our "traditional notions of fair play and substantial justice" (*International Shoe Company* v. *Washington*, 326 U. S. 310, 316 [1945]), the situs of the debt or claim is in New York and subject to the asserted jurisdiction of its Legislature.

A.

The late Justice Cardozo, while sitting as a Judge of the New York Court of Appeals, in speaking of the situs to be attributed to intangibles, said, in *Severnoe Securi-*

ties Corp. v. *London and L. Insurance Co.*, 255 N. Y. 120, 123-4; 174 N. E. 299, 300 [1931];

"* * * The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditors; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found (*Farmers L. & T. Co.* v. *Minnesota*, 280 U. S. 204, 211, 217; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm.*, 282 U. S. 1; *Liverpool & London & Globe Ins. Co.* v. *Board of Assessors*, 221 U. S. 346, 354; *Wyman* v. *Halstead*, 109 U. S. 654; *Douglass* v. *Phenix Ins. Co.*, 138 N. Y. 209, 219; *Harris* v. *Balk*, 198 U. S. 215). At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions (*Safe Deposit & T. Co.* v. *Virginia*, 280 U. S. 83, 92, 93; Powell, Business Situs of Credits, 28 W. Va. L. Quart. 89; cf. 34 Yale L. J. 652, 654, 656). * * *"

Viewed in this light, we submit there can be no question but that the situs of the debts or claims due under policies arising as a result of transactions between New York agencies of foreign corporations and residents of New York, insuring the lives of residents of New York and issued for delivery in New York, must be deemed to be in New York and subject to the asserted jurisdiction of its Legislature.*

* As the Court of Appeals pointed out in its opinion, New York is the place where, under the authorities, such contracts are to be considered made (R. 64-65). In fact, Insurance Law, Sec. 143 (2) prohibits foreign companies, as well as domestic, from providing in any policy "delivered or issued for delivery in this state" that the policy shall "be governed by the laws of any state or country other than this state."

These foreign insurance corporations may not do business in New York until they submit themselves to the jurisdiction of its courts; they must obtain from the Superintendent of Insurance a certificate authorizing them to do business in New York; they must deposit securities to the same extent as domestic companies; they must comply with regulations affecting domestic companies; they are subject to the same examination by the Superintendent as domestic companies; they must appoint the Superintendent as their attorney in New York for the service of all process in any action or proceeding (New York Insurance Law, Secs. 42; 59; 103; 143; 208 [5]; 216 [6]; *Morgan v. Mutual Benefit Life Insurance Co.*, 189 N. Y. 447; 82 N. E. 438 [1907]). They exercise the privilege of conducting business in New York with its residents. They enjoy the benefits and protection of the laws of New York. The obligation to which they are now subjected arises out of and is wholly connected with their activities in New York. The amounts due on these policies are an integral part of their local business and beyond question have acquired a local situs.

Citing, among others, the decisions of this Court in *Curry* v. *McCanless*, 307 U. S. 357 [1939]; *Hoopeston Co.* v. *Cullen*, 318 U. S. 313 [1943]; and *International Shoe Co.* v. *Washington*, 326 U. S. 310 [1945]. *supra*, the Court of Appeals has said in the case at bar (R. 65):

> "* * * For the core of the debtor obligations of the plaintiff companies was created through acts done in this State under the protection of its laws and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature."

We respectfully submit that no other conclusion can be justified.

In addition to the cases cited by the Court of Appeals, see also:

Metropolitan Life Insurance Co. v. *New Orleans*, 205 U. S. 395 [1907];
Liverpool and London & Globe Insurance Co. v. *Board of Assessors*, 221 U. S. 346 [1911];
Orient Insurance Co. v. *Board of Assessors*, 221 U. S. 358 [1911].

Waiving aside all of these factors, appellants would have this Court attribute to these debts a situs in the state of the companies' incorporation simply because they were there chartered and there have their home offices. This Court has already answered such a contention in *Wheeling Steel Corp* v. *Fox*, 298 U. S. 193, 211 [1936]:

> "* * * To attribute to Delaware, merely as the chartering State, the credits arising in the course of the business established in another State, and to deny to the latter the power to tax such credits upon the ground that it violates due process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering State all the tangible possessions of the Corporation without regard to their actual location."

See also:

Wirt Franklin Petroleum Corp. v. *Gruen*, 139 F. (2d) 659 [1944];
Young v. *South Tredegar Iron Co.*, 85 Tennessee 189, 196 *et seq.*; 2 S. W. 202, 204-6 [1886].

B.

Bearing in mind the public interest with which the business of life insurance is vested, New York, in common with other states, exacts strict compliance from insurance

companies with regulatory laws enacted to safeguard its citizens. These laws apply equally to any company doing business in the state, whether there chartered or elsewhere.

The domestic agencies of foreign corporations are in the eyes of the law, complete and separate organizations which are on a parity with and to be treated as domestic corporations. Even if, *arguendo*, we adopt the technical criterion urged by appellants, to wit, that the domicile of the debtor corporation is determinative of situs, we submit that in fixing the situs of the debt due on a policy written through the New York agency of a foreign company, on the life of a New York resident, and issued for delivery in New York, the New York agency must be regarded as if it were actually a complete and separate New York corporation with a resultant domicile in New York.

In *New England Mutual Life Insurance Co.* v. *Woodworth*, 111 U. S. 138 [1884], this Court, faced with a question analogous to the one here raised, held that where a life insurance company does business in a state other than that in which it is incorporated, "*the corporation must be regarded as having a domicil there, in the sense of the rule that the debt on the policy is assets at its domicil*" (p. 145). [Italics supplied.]

Citing the foregoing authority, among others, the late Justice Cardozo, in *Comey* v. *United Surety Company*, 217 N. Y. 268, 274; 111 N. E. 832, 834 [1916], said:

> "We think that a foreign corporation thus licensed under our own laws may not with reason be held to be absent from our state. It owes to the law of its creation its franchise to be a corporation, but it owes to the law of this state the privilege of doing business within our borders. In exercising that privilege it may be dealt with as if it were in truth a domestic corporation. This view of its position has support in recent decisions. In *Morgan* v. *Mutual Benefit Life*

Ins. Co.," (189 N. Y. 447, 454) we held that for many purposes a foreign insurance company, transacting business here, must be 'treated as a domestic insurance company and as domiciled in this state.' We pointed out that its presence here is 'not temporary, but continuous,' and under the authority of our laws. More recently, in *Lockwood* v. *U. S. Steel Corporation* (209 N. Y. 375, 385) we said that foreign insurance companies must be 'regarded as domiciled for certain purposes in the foreign state where they are permitted to do business.' (See also *New England Mut. Life Ins. Co.* v. *Woodworth*, 111 U. S. 138.) The principle of these decisions is applicable here. The defendant is not here occasionally and according to the shifting pleasure of its managers. It is here with a representative for the service of process under an appointment made permanent by the will of the law. In its transaction of business in New York, it is to be dealt with, *pro hac vice*, as a domestic corporation."

In *Morgan* v. *Mutual Benefit Life Insurance Co.*, 189 N. Y. 447, *supra*, the court held that the amount payable on a policy issued to a resident of New York by the domestic agency of a foreign insurance company has its situs as personal property in New York, and said (p. 454):

"* * * The contract of insurance was made by it with a resident of this state through its agents so located and doing business here. Every transaction relating to the contract, its assignment and the payment of premiums thereon has occurred here. The policy of insurance and the claim against the insurance company for the amount payable on the policy of insurance are in the control of our court and any judgment that may be rendered in the action can be enforced and made effectual in this state. As to such a claim the insurance company should be treated as a domestic insurance company and as domiciled in this state.

> The situs of the debt would consequently be here and the action is one to define and enforce an interest in specific personal property within the state within the meaning of the Code provision quoted. Whenever a question as to the situs of a similar claim against an insurance company doing business in a state pursuant to the statutes thereof has been directly involved in this court or in the Federal courts, and it has been sought to uphold the situs of the claim in the state where the contract was made, it has been sustained."

In this last mentioned case the court exhaustively reviewed all the authorities sustaining its position as to the situs in New York of the proceeds of the policy. In order that this brief be not unnecessarily lengthened, we respectfully refer this Court to the full discussion of the pertinent cases therein contained. We shall content ourselves with the observation made in *Martine* v. *The International Life Insurance Society of London*, 53 N. Y. 339, 347-8 [1873]:

> "It would be most unreasonable for these foreign corporations to ask the privilege of doing business under our laws in competition with domestic institutions, and then to ask exempton from the obligations and liabilities which attach to the latter. As to the business transacted here, the company must be regarded as domiciled by the residence of its general agents and its local organization."

The rule as to domestic branches of alien insurance companies is the same; in *Moscow Fire Insurance Company* v. *Bank of New York and Trust Company*, 280 N. Y. 286, 309-310; 20 N. E. (2d) 758, 766-7 [1939], (aff'd, *sub nom. U. S.* v. *Moscow Fire Insurance Co.* 309 U. S. 624), the late Judge Lehman said:

> "* * * The Insurance Law requires that before a foreign insurance corporation is permitted to do busi-

ness here there must be a definite separation and division of its property and even of its juristic personality. 'The Insurance Law as now written and as an entirety indicates a purpose and policy in dealing with foreign insurance companies doing business in this country which are so definite and plain that they fix upon the words under consideration an interpretation which cannot fairly be avoided. We think that the Legislature in allowing these foreign companies to do business in this State and country intended to treat the domestic agency largely as a *complete and separate organization,* to place it on a parity with domestic corporations, to supervise and regulate it as such and to require it by the deposit of prescribed assets *to set up within this country a capital corresponding to that of domestic corporations* and which should be security for business transacted by it here and not elsewhere.' (Matter of People [Norske Lloyd Ins. Co.] 242 N. Y. 148, 158.) (Italics are new.) Thus the property of the United States branch of a foreign insurance company acquires a character of its own. That character is 'dependent' upon the law of this State. The property from its nature is subject to the laws of this State, and both the property and 'the complete and separate organization' analogous to a domestic corporation are immune from the control of any foreign power. No rule of comity and no act of the United States government constrains this State to abandon any part of its control or to share it with a foreign State. * * *"

C.

In an effort to draw an analogy with the case of a New York resident who of choice deposits his money in a bank physically situated outside the State, appellants would have us believe that the New York resident who dealt with

a foreign insurance company deliberately chose to do his business and send his money out of the state (App. Br., p. 27). We think it a matter of common knowledge and experience that the person about to take out a policy of life insurance gives not a single thought to the fictional domicile of the insurance company. On the contrary, he knows that he is dealing with an agency of a company doing business in New York; a company which is licensed and regulated by New York for his protection.

D.

Nor can we agree that there is a "jurisdictional conflict" between the New York and Pennsylvania statutes (App. Br., p. 31). In Appendix B of their brief, appellants have set forth the definition of the word "company" as used in the Pennsylvania statute to be: "* * * insurance * * * corporations * * * incorporated * * * under the laws of this Commonwealth * * *" (App. Br., p. 47). Actually, between the words "incorporated" and "under" there appears another phrase which we believe changes the alleged meaning given to the definition by the appellants. The omitted phrase is "and doing business" so that the definition reads: "* * * insurance * * * corporations incorporated and doing business under the laws of this Commonwealth". (Purdon's Pennsylvania Statutes, Title 27, Sec. 435).

The effect of the limitation inserted by the words "and doing business under the laws of this Commonwealth" may be best seen by noting the language used in another portion of the Pennsylvania statute (*id.* Sec. 241) dealing with the escheat of unclaimed deposits wherein, in defining the persons subject to the statute, the act reads: "* * * every * * * insurance company * * * doing business within this Commonwealth."

We think it clear that the Pennsylvania legislature intended to exercise jurisdiction only over the business done

by its domestic companies within the Commonwealth (cf. *Mutual Life Insurance Co.* v. *Cohen*, 179 U. S. 262, *supra*).

That the best which can be said of the Pennsylvania statute is that it is ambiguous is evidenced by the allegations of the appellants in the very case at bar as contained in paragraph 27(n) of the Complaint (R. 20): "The States of Michigan, Pennsylvania and Kentucky have enacted similar statutes which, although vague and ambiguous, apparently provide for the payment to those States of the proceeds of insurance policies as abandoned property * * *."

Also in Appendix B of appellants' brief (p. 47), the statement is made that "Both States claim jurisdiction to escheat such policies." Despite the fact that one of the appellants is a Pennsylvania corporation (Penn Mutual Life Insurance Company—R. 5), yet nowhere in the Complaint (R. 4-33) is there contained a single allegation that the company has even been asked by the Commonwealth of Pennsylvania to pay over to it the proceeds of policies affected by the New York statute—that is, policies written through the New York agency of the company, on the lives of New York residents, and issued for delivery in New York.

The New Jersey statute (App. Br., p. 50) is similar to the New York statute in that it seeks to cover only the business done in New Jersey. The distinction between New Jersey and New York is that the former refers only to the business done in New Jersey by the domestic companies of that State. There is no basic conflict with New York. A policy written by a New York agency of a New Jersey corporation on the life of a resident of New York, and issued for delivery in New York, would not be covered by the New Jersey statute.

The same may be said of the Massachusetts statute (App. Br., p. 50). Not only does the statute limit the coverage to policies "issued on the lives of residents of this commonwealth" but the act provides in addition that if the

address given in the application for the policy is in the Commonwealth it is to be deemed a policy issued on the life of a resident of the Commonwealth within the meaning of the statute.

If the test of situs which we espouse and which the courts below have held to be controlling were to be applied by every other State, we would have a most desirable and just solution, for then each State would take into its custody proceeds on policies written by domestic companies and domestic branches of foreign companies on the lives of residents of that State and issued for delivery in that State.

E.

At page 30 of their brief, appellants contend that it is "Wasteful to report to 48 States, each with different statute and rules." Of course, no such situation now exists and if we take as a criterion the only statutes now existing, to wit, New York, Pennsylvania, New Jersey and Massachusetts, there is no basic conflict.

Fears of what other states may do are purely hypothetical and unreal possibilities which have no place whatsoever in the determination of the constitutionality of a statute. (*Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 353 [1937]; 16 *Corpus Juris Secundum, Constitutional Law*, Sec. 97.) The judiciary will not anticipate prospective conditions which are speculative and conjectural and may never arise (*Hodge Drive-It-Yourself Co.* v. *Cincinnati*, 284 U. S. 335, 338 [1932]).

An apprehension of exposure to "double liability" cannot be the basis of a declaration of unconstitutionality. "The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it" (*California* v. *San Pablo & Tulare R. R. Co.*, 149

U. S. 308, 314 [1893]). "This court does not sit here to try, moot cases to solve a question which may never be raised by any party entitled to raise it" (*Waite* v. *Dowley*, 94 U. S. 527, 534 [1876]).

See also:

Rescue Army v. *Municipal Court of Los Angeles*, 331 U. S. 549 [1947], at pp. 568, *et seq.*

So, too, we might here note that the appellants are in no position to question the effect of the statute on the rights of the assured, the beneficiaries or those claiming under them. One may attack the constitutionality of a statute only when and so far as it is being, or is about to be, applied to his own disadvantage; he cannot present constitutional objections on behalf of others. (*Tileston* v. *Ullman*, 318 U. S. 44 [1943]; *Doeller* v. *Neilston Warehouse Co.*, 311 U. S. 531 537 [1941]).

In *McCabe* v. *A. T. & S. F. Ry. Co.*, 235 U. S. 151, 161, 162 [1914], it was said that "the essence of the constitutional right is that it is a personal one". "The complainant cannot succeed", said Mr. Justice Hughes, "because some one else may be hurt. Nor does it make any difference that other persons, who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention."

Of course, the statute fully protects the rights of any person entitled to claim the proceeds of a policy. The act makes provision for the filing of claims with the State Comptroller and judicial review of any decision adverse to the claimant. The State takes over custody of the money as the representative of the parties entitled to payment and holds it for their protection (*Anderson National Bank* v. *Luckett*, 321 U. S. 233, *supra*, at page 241).

POINT IV

The Statute in no way violates appellants' constitutional rights.

As to Due Process and the Contract Clause Generally.

Whatever name we apply to the contractual relationship between the insurance companies and the policy holder or beneficiary, the fact remains that upon the maturity of an endowment policy or the death of the assured in a life policy, there is a liquidated debt due and owing from the company to those entitled to claim under the policy, a debt similar to bank deposits (*New York Life Ins. Co.* v. *Federal National Bank*, 151 F. (2d) 537, cert. den. 327 U. S. 778, *supra*). Two of the three types of policies set forth in Sec. 700 consist of contracts in which all conditions have actually been met; paragraph (a) of subdivision 1 applies to matured endowment policies, while paragraph (c) makes reference to policies where the assured has actually died. The third type, defined in paragraph (b), covers cases of presumed death where the insured, if living, would have reached the maximum age under the mortality table, varying from 96 to 100 years of age.

The case of *Anderson National Bank* v. *Luckett*, 321 U. S. 233, *supra*, and the other cases cited under Point I of this brief, fully dispose of all of the constitutional objections here raised by the appellants. Especially is this true of the *Anderson National Bank* case, for there, too, debts of a foreign corporation—a national bank—being situated in Kentucky, were held to be "a part of the mass of property within the state whose transfer and devolution is subject to state control" (p. 248), and to the state's "escheat" law In that case, this Court, in disposing of the due process and contract clause objections raised by the bank, said (p. 242):

> "Since the bank is a debtor to its depositors, it can interpose no due process or contract clause objection

to payment of the claimed deposits to the state, if the state is lawfully entitled to demand payment, for in that case payment of the debt to the state, under the statute, relieves the bank of its liability to the depositors."

Even though it has been held that payment to the State in and of itself discharges the obligation of the debtor (*Security Bank* v. *California*, 263 U. S. 282, 286, *supra; In re: Philadelphia Electric Company*,* 352 Pa. 457, *supra*), our Abandoned Property Law gives the debtor added protection by a specific provision that the insurance company, upon "making a payment of abandoned property to the comptroller shall immediately and thereafter be relieved and held harmless from any or all liability for any claim or claims which exist at such time with reference to such abandoned property or which may thereafter be made or may come into existence on account of or in respect of any such abandoned property" (Sec. 1404 [2]). Subdivision 3 of Sec. 1404 protects the insurance company from suit for "the recovery of abandoned property paid to the state comptroller * * * or for interest thereon subsequent to the date of the report" or for damages alleged to have resulted from such payment. Section 1405 provides that "no owner of abandoned property shall be entitled to re-

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* In the *Philadelphia Electric Company* case, involving unpaid dividends, etc., the court said: "* * * The power of the legislature to render property of the character here involved subject to escheat in favor of the Commonwealth is clear. * * * A legislative provision for escheat is a valid exercise of the police power of the State: see *Cunnius* v. *Reading School District, supra*, at p. 469 of 198 U. S. There is, therefore, no merit in the contention of the appellant companies that the Act of 1937, construed together with the Act of 1915, works a deprivation of property without due process of law. Nor do those statutes serve to impair the obligation of contracts. The constitutional guarantee in such connection is likewise subject to an appropriate exercise of the State's police power: *Zeuger Milk Company* v. *Pittsburgh School District*, 334 Pa. 277, 280, 5 A. 2d 885."

ceive interest on account of such abandoned property from and after the date" of the report, "whether or not he was entitled to interest on such property prior to such date" (cf. *Provident Institution, etc.* v. *Malone*, 221 U. S. 660, 665, *supra; Brooklyn Borough Gas Co.* v. *Bennett*, 154 Misc. 106, 115-116, *supra*).

In order that there should be no possibility of any question of lack of due process raised by a policy holder with regard to the foregoing provisions, the statute provides that before payment is made by the insurance company to the State, a statement as to such funds shall be published and among other things shall state that the unclaimed moneys will be paid to the State Comptroller and that the insurance company "shall thereupon cease to be liable therefor" (Sec. 702, subd. 3 [c. iii]).

Anderson National Bank v. *Luckett*, 321 U. S. 233, *supra;*
Security Bank v. *California*, 263 U. S. 282, *supra.*

When this action was first instituted, the insurance companies complained that even though they were relieved of liability under the law, yet they might be subject to suit by a policy holder in another state or that for reasons of good will they would want to pay a policy holder rather than to relegate him to a claim against the state. To obviate this objection, Chapter 452 of the Laws of 1946 added a new section 707 to Article VII of the Abandoned Property Law, reading as follows:

> "Sec. 707. Any life insurance corporation which has paid to the state comptroller moneys deemed abandoned property pursuant to the provisions of this article may make payment to any person entitled to all or any part thereof and shall thereby acquire all of the rights of such person to payment by the state comptroller."

Section 1407 provides that where the state comptroller makes payment of a claim, he shall deduct a service charge of one per cent, but in no event less than three dollars. The appellants would now seem to contend that if they should pay to a policy holder after the fund has been transferred to the state, they would, in recovering the money, lose the amount of this service charge. Aside from the question as to whether repayment of a fund to the insurance company itself (as distinguished from a claim established by and paid to one claiming under the policy) would come within the meaning or intent of Section 1407, the fact that this presents a purely hypothetical question as to what may happen (in no sense a proper basis for attack on the constitutionality of the statute as a whole), the insurance companies, if they do make payment after transfer to the State, may well be justified under the statute in making this same service charge against a creditor who has waited at least seven years to make his claim. In any event the question as to whether the State is entitled to make this service charge could arise only after the insurance company has seen fit to make payment subsequent to transfer to the State and would be the proper subject of litigation at the time of making a claim against the State under Section 707 rather than at this time when the constitutionality of the statute as a whole is under attack.

In so far as the expense of preparing the report and arranging advertising and the publication itself are concerned, we believe that Special Term has amply answered the argument of the appellants (R. 54):

> "Some mention is made in plaintiff's brief of the expense of preparing reports and arranging advertising for which, it is claimed, the companies receive no compensation. No real point is made of this, however. Section 1409 provides that any amount paid to newspapers for any publication of names required by the statute shall be charged equally against all abandoned

property held or owing at the time of the publication, except abandoned property of individual amounts of less than twenty-five dollars. The expense of preparing reports of abandoned claims, equally applicable to domestic and foreign corporations, is one which the state may impose without rendering the statute unconstitutional."

Cf. *Anderson National Bank* v. *Luckett*, 321 U. S. 233, *supra*, at pages 252-3.

As to the Statute of Limitations.

In the courts below, appellants contended that the statute should not be given a retroactive application and that if it be so construed "it illegally attempts to revive claims barred by the statute of limitations" (R. 65). Although appellants do not specifically mention these points in their Assignment of Errors or in their Argument, yet at pp. 7-8 of their brief, under a sub-heading to the effect that the decision below nullifies terms of contracts, they do make mention of the fact that the Court of Appeals "sees no obstacle to giving it 'a retrospective application'."

The Court of Appeals has given the statute a retrospective application. We assume that for the purpose of deciding the constitutional questions raised by appellants, this Court will "take the statute as though it read precisely as the highest court of the State has interpreted it". (*State of Minnesota ex rel Pearson* v. *Probate Court, etc.*, 309 U. S. 270, 273 [1940]).

Appellants' contention in the courts below was that since the statute applies only to policy debts which have existed for at least seven years and the statute of limitations applicable to contracts generally is six years, it follows that the debts sought to be taken into custody by

the State are barred and the moneys due on the policies are the property of the insurance companies, thereby making unconstitutional the provisions of Sec. 1400 of the law which provides that "The expiration of any period of time specified by law, during which an action or proceeding may be commenced or enforced to secure payment of a claim for money or recovery of property, shall not prevent any such money or property from being deemed abandoned property, * * *."

A.

Even if we assume, *arguendo*, that all policy debts are barred by the statute of limitations if no claim is made within six years of maturity in the case of an endowment policy or the death of the assured in the ordinary life policy, yet it is plain that the running of the statute merely wipes out the creditor's remedy and not the debt, and that no property right is created in the debtor insurance companies. The running of the statute simply leaves the companies in the position of holding unclaimed funds as to which there is a failure of ownership.

State v. *Marshall & Illsey Bank of Milwaukee*, 234 Wis. 375, 291 N. W. 361 [1940], involved a statute directing that unclaimed bank deposits be turned over to the custody of the State after a lapse of a specified number of years. The bank contended that since the statute of limitations had run against the depositor's right to collect the money, the State's attempt to take the fund was actually a taking of the bank's own property and therefore unconstitutional. The Supreme Court of Wisconsin, in overruling this contention, said (p. 379):

> "The bank urges in defense that the state statute of limitations had destroyed the claimant's right of action to recover the funds, and that therefore the funds were not 'on deposit or otherwise' when the statute went into effect. If our statute of limitations

> has destroyed the claimant's rights it is no affair of the bank under the instant statute. The bank's rights as against the state are not affected by it. 'The contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor.' *Securities Savings Bank* v. *California, supra,* p. 286 [of 263 U. S.]. The bank is not affected by the statute of limitations when it has no right to retain the money."

"The Statute of Limitations does not pay the debt. It merely deprives claimant of its remedy." (*Matter of Elm Street,* 239 N. Y. 220, 229; 146 N. E. 342, 345 [1924]). "The fact that the statute of limitations may have run against the owners of the property in controversy as between them and the accountable corporate custodian does not operate to defeat the Commonwealth's escheatage * * *." (*In re*: *Philadelphia Electric Company,* 352 Pa. 457, 463, *supra*).

See also:

Commonwealth ex rel. Margiotti v. *Cunningham,* 337 Pa. 289, 297-8; 10 A. 2d 559, 563 [1940];

In re: *Pennsylvania Indemnity Corp'n.,* 37 Pa. District and County Reports 208 [1939];

In re: *The Harrisburg Gas Company,* 38 Pa. District and County Reports 611 [1940];

30 *Corpus Juris Secundum, Escheat* Sec. 3, subd. (b).

Even if the statute be so construed that abandoned claims be revived thereby, "this will be no offense against constitutional law". (R. 66; *Campbell* v. *Holt,* 115 U. S. 620 [1885], *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304 [1945]; *Matter of New York University* (*Moore*), 296 N. Y. 913 [1947]).

B.

In view of the foregoing, we need not concern ourselves with the question as to whether the six year statute of limitations (N. Y. Civil Practice Act, Sec. 48 (1)) applies to matured life insurance policies where there has been a failure of ownership. In any event, it must be remembered that the statute of limitations would not begin to run until the beneficiary was in a position to present proof of death— a most improbable occurence in these cases where there is a total failure of ownership. (*Gardner* v. *Northwestern Mutual Life Insurance Company,* 246 App. Div. 868 (1), 285 N. Y. Supp. 74 [1936]; aff'd 272 N. Y. 592, 4 N. E. (2d) 818).

Conclusion

In Appendix B of their brief (pp. 48-50), appellants point out that the first enactment dealing with abandoned funds held by insurance companies was chapter 923 of the Laws of New York of 1939; that this act applied only to domestic companies; that in an action by the New York Life Insurance Company to have the act declared unconstitutional, an injunction *pendente lite* was granted; that the statute was then amended so as to limit it to policies issued by New York companies upon the lives of residents of New York and that as a result, the action was discontinued.

The orignial 1939 statute was very much different from the one under consideration in this case. It not only covered matured policies, but also certain reserves on policies under non-forfeiture provisions and on annuity policies; it applied to all domestic companies regardless of the state in which the business was transacted. Special Term (*New York Life* v. *Pink et al.,* New York Law Journal, Dec. 21, 1939, p. 2257, N. Y. Supreme Court, N. Y.

County, Special Term, Part III, *McCook, J.;* not officially reported) expressly disclaimed "any intention of passing even on the question of reasonableness, and has no opinion to express on that of constitutionality," but granted an injunction *pendente lite* solely on the ground that important constitutional questions were involved and the insurance companies should not be put to the expense of publishing reports until such questions could be litigated.

When the statute was amended so as to limit its applicability to policies written on the lives of residents of New York—that is, making the act applicable only to the business transacted in New York—the insurance companies withdrew their action.

Aside from the question of situs, every objection to the statute raised by the appellant foreign insurance companies is equally available to domestic companies. Yet, as pointed out by Special Term in the case at bar, "Since the 1940 amendment, which restricted the scope of the 1939 statute to policies issued by domestic companies on the lives or residents of this state, no domestic company has questioned the validity of the statute" (R. 51).

An affirmance by this Court of the judgment below will simply mean that the business done by domestic agencies of foreign insurance corporations in New York is to be treated in exactly the same manner and subject to the same requirements (in so far as the Abandoned Property Law is concerned) as the business transacted by domestic insurance companies in New York. The New York Legislature, by this law, properly seeks to reach only the business done in New York, and not elsewhere. (*Mutual Life Insurance Co.* v. *Cohen,* 179 U. S. 262, *supra*; *U. S. Mortgage & Trust Co.* v. *Ruggles,* 258 N. Y. 32; 179 N. E. 250 [1932]). A reversal would lead to the wholly unjustifiable result that the proceeds of unclaimed or abandoned policies which "were written and/or delivered in New York by New York agencies of the [foreign] companies and insured the lives of New York residents" (R. 51)

would be paid over to other states simply because the companies were originally there incorporated, rather than to New York. "* * * in States bound together by a Constitution and subject to the Fourteenth Amendment, more caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." (Mr. Justice Holmes in *McDonald* v. *Mabee*, 243 U. S. 90, 91 [1917]).

We respectfully submit that the judgment of the Court below should in all respects be affirmed.

Dated, New York, N. Y., December 1, 1947.

Respectfully submitted,

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